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No. 99-___

In The

Supreme Court of the United States

SPOKANE VALLEY FIRE PROTECTION DISTRICT NO. 1, a Public Employer and Political Subdivision of the State of Washington,

Cross-Petitioner,

v.

GARY COLLINS, *et al.*,

Cross-Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

CROSS-PETITION FOR A WRIT OF CERTIORARI

JEFFREY A. HOLLINGSWORTH*
SARAH H. VILLANUEVA
PERKINS COIE LLP
1201 Third Avenue, 48th Floor
Seattle, WA 98101-3099
(206) 583-8888
Counsel for Cross-Petitioner
**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

In light of the Court's decision to grant certiorari in *Christensen v. Harris County*, No. 98-1167, 1999 U.S. LEXIS 6902 (U.S. Oct. 12, 1999) ("*Christensen*"), should the Court grant certiorari to decide whether the Ninth Circuit Court of Appeals erred in holding that the Fair Labor Standards Act of 1938, 29 U.S.C. § 201 *et seq.* (the "FLSA"), does not prohibit a public employer from compelling its employees to use their accrued compensatory time, where the employer and the employees' union have negotiated and entered into a collective bargaining agreement and the employer acted in accordance with that agreement when compelling its employees to use compensatory time?

PARTIES

Defendant-Appellee below and Cross-Petitioner in the Court (the "Fire District"):

> Spokane County Fire District No. 1, a Public Employer and Political Subdivision of the State of Washington

Plaintiffs-Appellants below and Cross-Respondents in the Court (the "Firefighters"):

> Gary Collins
> Dennis Doyle
> Gary Ghirarduzzi
> Bruce Hamner
> Don Matthews
> Jeff McLaughlin
> Wayne McLaughlin
> Jeff Miner
> Dave Phay

TABLE OF CONTENTS

Page

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY AND REGULATORY PROVISIONS 1

INTRODUCTION 1

STATEMENT OF THE CASE 2

SUMMARY OF THE ARGUMENT 2

REASONS FOR GRANTING THE WRIT 4

A. THE FIRE DISTRICT ORDERED THE FIREFIGHTERS TO SCHEDULE COMPENSATORY TIME IN ACCORDANCE WITH A NEGOTIATED COLLECTIVE BARGAINING AGREEMENT 5

1. The FLSA Permits a Public Employer to Enter Into an Agreement With the Union Regarding Compensatory Time 5

2. The Fire District and the Union Negotiated a Compensatory Time Provision as Part of Their Collective Bargaining Agreement ... 6

3. In Accordance With the Negotiated Agreement, the Fire District Ordered the Firefighters to Schedule Compensatory Time 7

B. *CHRISTENSEN* AND *HEATON* DO NOT INVOLVE A NEGOTIATED AGREEMENT BETWEEN THE PARTIES 7

C. THE FACTUAL DIFFERENCES PRESENTED BY THIS CASE SUPPORT GRANTING THIS CROSS-PETITION 8

CONCLUSION 9

TABLE OF AUTHORITIES

Page

CASES

Christensen v. Harris County, No. 98-1167, 1999 U.S. LEXIS 6902 (U.S. Oct. 12, 1999) ..... *passim*

Collins v. Lobdell, 188 F.3d 1124 (9th Cir. 1999), *petition for cert. filed*, (October 5, 1999) 1

Heaton v. Moore, 43 F.3d 1176 (8th Cir. 1994)...2, 3, 4, 7, 8

Moreau v. Harris County, 158 F.3d 241 (5th Cir. 1998), *cert. granted, in part, sub nom. Christensen v. Harris County*, 1999 U.S. LEXIS 6902 (U.S. Oct. 12, 1999) 2, 7

STATUTES

28 U.S.C. § 1254(1) 1

29 U.S.C. § 201 *et seq.* i

29 U.S.C. § 207(o) 3, 6

29 U.S.C. § 207(o)(2)(A)(i) 6

29 U.S.C. § 207(o)(2)(A)(ii) 7

OPINIONS BELOW

The Fire District refers the Court to the Firefighters' Petition for Writ of Certiorari in this case, which was filed with the Court on October 5, 1999, and assigned docket number 99-592 ("Petition for Writ of Certiorari"). *See* Petition for Writ of Certiorari at 1-2, App. A-B. Since the filing of the Petition for Writ of Certiorari, the Ninth Circuit decision below has been published. *See Collins v. Lobdell*, 188 F.3d 1124 (9th Cir. 1999), *petition for cert. filed*, (October 5, 1999).

JURISDICTION

The Ninth Circuit entered judgment in the present case on August 24, 1999. The Firefighters filed the Petition for Writ of Certiorari on October 5, 1999, and the petition was docketed by the Court on that date. The Fire District invokes the Court's jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS

See Petition for Writ of Certiorari at 2, App. C-D.

INTRODUCTION

The Fire District respectfully requests that the Court grant this cross-petition for writ of certiorari, which seeks review of the Order of the Ninth Circuit dated August 24, 1999, in light of the Court's decision to grant the petition

for writ of certiorari in *Christensen*. Resolution of the issue in *Christensen* will affect the outcome in this case, as this case presents a related question. This case, however, presents a factual pattern different from *Christensen* which, in the Fire District's view, should be considered in resolving the overall issue presented by both *Christensen* and the present case. Therefore, the Fire District respectfully requests that the Court consider this case in connection with the *Christensen* case.

STATEMENT OF THE CASE

The Fire District refers the Court to the "Statement of the Case" set forth in its Opposition to Petition for a Writ of Certiorari, which was filed with the Court, along with this brief, under the docket number 99-592.

SUMMARY OF THE ARGUMENT

In light of the Court's decision to grant the petition for writ of certiorari in *Christensen*, the Fire District respectfully requests that the Court grant this cross-petition. The petition for writ of certiorari in *Christensen* was based on a conflict between the Fifth Circuit in that case (*see Moreau v. Harris County*, 158 F.3d 241 (5th Cir. 1998), *cert. granted, in part, sub nom. Christensen v. Harris County*, 1999 U.S. LEXIS 6902 (U.S. Oct. 12, 1999)) and the Eighth Circuit in *Heaton v. Moore*, 43 F.3d 1176 (8th Cir. 1994) ("*Heaton*"). The question before the Court in *Christensen* is

> [w]hether a public agency governed by the compensatory time provisions of the Fair Labor

> Standards Act of 1938, 29 U.S.C. 207(o), may, absent a preexisting agreement, require its employees to use accrued compensatory time.

1999 U.S. LEXIS 6902, at *1 (U.S. Oct. 12, 1999). The present case similarly involves compelled use of compensatory time. But this case, unlike *Christensen* and *Heaton*, involves a preexisting agreement regarding use of compensatory time. Therefore, this case should be considered by the Court along with *Christensen*.

In this case, the Fire District and International Association of Fire Fighters Local 876 (the "Union") negotiated an agreement regarding the preservation and use of compensatory time and included the compensatory time provision in their collective bargaining agreement (the "collective bargaining agreement"). The Fire District, when ordering the Firefighters to schedule one or two shifts of compensatory time off within a one-month period, acted in accordance with that agreement.[1] On the other hand, the employers in both *Christensen* and *Heaton* did not act in accordance with a negotiated agreement. Rather, in those cases, the employers *did not have an agreement* with their employees or their employees' representatives pursuant to which the employers compelled their employees to use compensatory time.

---

[1] The Ninth Circuit followed the Fifth Circuit in *Christensen* and chose not to rely on the terms of the parties' agreement concerning compensatory time. Rather, the Ninth Circuit ruled, consistent with the Fifth Circuit's ruling in *Christensen*, that even in the absence of an agreement, the FLSA does not prohibit employers from compelling employees to use compensatory time. *See* Petition for Writ of Certiorari at App. A10-A11.

In light of this factual difference between *Christensen* and *Heaton* and the present case, the Fire District respectfully requests that the Court grant this cross-petition for writ of certiorari and consider this case along with *Christensen*.

REASONS FOR GRANTING THE WRIT[2]

The parties in this case, unlike the parties in *Christensen* and *Heaton*, entered into a collective bargaining agreement that governs the preservation and use of compensatory time. Consistent with that agreement and the understanding between the parties, as the Firefighters' accrued compensatory time approached the 144-hour cap, the Fire District ordered the Firefighters to schedule one or two shifts of their compensatory time within a one-month period. In other words, the Fire District, unlike the employers in *Christensen* and *Heaton*, ordered the Firefighters to schedule compensatory time pursuant to the negotiated agreement between the parties. This case therefore presents a factual scenario that was not considered by the Fifth and Eighth Circuits in *Christensen* and *Heaton* – a scenario that should be considered by the

[2] The facts herein are based on the Ninth Circuit opinion, the District Court opinion, and the factual record below. The Ninth Circuit and District Court opinions have been reproduced and attached as Appendix A and Appendix B, respectively, to the Petition for Writ of Certiorari. Citations to the factual record below are abbreviated as "ER" for Excerpts of Record and "SER" for Supplemental Excerpts of Record.

Court when ruling in connection with the *Christensen* case.

A. THE FIRE DISTRICT ORDERED THE FIREFIGHTERS TO SCHEDULE COMPENSATORY TIME IN ACCORDANCE WITH A NEGOTIATED COLLECTIVE BARGAINING AGREEMENT.

1. The FLSA Permits a Public Employer to Enter Into an Agreement With the Union Regarding Compensatory Time.

Under the FLSA, public employers may enter into agreements with their employees that provide for payment of compensatory time off in lieu of overtime pay. Under Section 7 of the FLSA, compensatory time can exist only pursuant to (a) a negotiated agreement between the employer and the employees' representative or (b) for unrepresented employees, an agreement between the employer and the employees themselves. Specifically, Section 7 provides, in relevant part:

> Compensatory time
>
> (1) Employees of a public agency which is a . . . political subdivision of a State . . . may receive, in accordance with this subsection and in lieu of overtime compensation, compensatory time off at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required by this section.
>
> (2) A public agency may provide compensatory time under paragraph (1) only –
>
> (A) pursuant to –

> (i) applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees; or
>
> (ii) in the case of employees not covered by subclause (i), an agreement or understanding arrived at between the employer and employee before the performance of the work . . . .

29 U.S.C. § 207(*o*).

2. The Fire District and the Union Negotiated a Compensatory Time Provision as Part of Their Collective Bargaining Agreement.

In the present case, in accordance with 29 U.S.C. § 207(*o*)(2)(A)(i), the Fire District and the Union negotiated and entered into a collective bargaining agreement that contains a compensatory time provision. That provision includes a 144-hour cap on accrual of compensatory time, after which the Fire District must pay employees at time and one-half for their services. SER 164, 185. Undisputedly, in negotiating the compensatory time provision, neither the Fire District nor the Union contemplated that employees would be routinely paid time and one-half for their services. Rather, the compensatory time arrangement was always intended to be a mechanism by which employees performed additional tasks outside their regular duties in exchange for time off. ER 35, ¶ 2.

3. In Accordance With the Negotiated Agreement, the Fire District Ordered the Firefighters to Schedule Compensatory Time.

The Fire District and the Union negotiated the compensatory time provision in the collective bargaining agreement with the understanding that the Fire District would allow employees to perform special assignments in exchange for time off. However, contrary to the undisputed intent behind the compensatory time provision, the Firefighters accrued compensatory time and did not use it. SER 164. Therefore, as the Firefighters' accrued compensatory time approached the 144-hour cap, the Fire District ordered them to schedule one or two shifts of compensatory time off within a one-month period. SER 165. This order was entirely consistent with the collective bargaining agreement and the understanding and intent of the parties when negotiating that agreement.

B. *CHRISTENSEN* AND *HEATON* DO NOT INVOLVE A NEGOTIATED AGREEMENT BETWEEN THE PARTIES.

The employers in both *Christensen* and *Heaton* did not act pursuant to a negotiated compensatory time provision. Rather, in both cases, the plaintiffs agreed to accept compensatory time in lieu of cash overtime under 29 U.S.C. § 207(*o*)(2)(A)(ii). *See* Brief for the United States as Amicus Curiae in *Christensen* at 4; *Heaton*, 43 F.3d at 1178. Moreover, when requiring their employees to use their accrued compensatory time, the employers in those cases acted pursuant to a unilaterally imposed policy. *See Moreau*, 158 F.3d at 243; *Heaton*, 43 F.3d at 1179. In neither

case did the circuit court address the effect of a negotiated agreement between the parties concerning the preservation and use of compensatory time. *See* Brief for the United States as Amicus Curiae in *Christensen* at I, 7-9, 10-11 n.6; *Heaton*, 43 F.3d at 1180 n.4 ("We take no position on section 207(*o*)(5)'s effect on any additional agreements between the employer and the employees which may limit the time and manner of the employees' use of compensatory time.").

Because neither *Christensen* nor *Heaton* involved a negotiated agreement concerning the use of compensatory time, the Fire District respectfully requests that the Court grant this cross-petition and consider the factual scenario in this case when considering *Christensen*.

C. THE FACTUAL DIFFERENCES PRESENTED BY THIS CASE SUPPORT GRANTING THIS CROSS-PETITION.

The Fire District and the Union in this case negotiated a compensatory time provision and included it in their collective bargaining agreement. When ordering the Firefighters to schedule one or two shifts of compensatory time within a one-month period, the Fire District acted in accordance with that agreement and the understanding of the parties. Even if the Court holds that an employer cannot unilaterally impose a policy under which it compels its employees to use compensatory time, the Fire District respectfully requests that the Court consider whether a public employer can compel

employees to use compensatory time if doing so is consistent with the negotiated agreement between the parties.[3]

CONCLUSION

Because this case presents a question related to that at issue in *Christensen*, the Fire District respectfully requests that the Court grant this cross-petition for writ of certiorari and consider this case when considering *Christensen*.

Respectfully submitted this 4th day of November, 1999.

JEFFREY A. HOLLINGSWORTH*
SARAH H. VILLANUEVA
PERKINS COIE LLP
1201 Third Avenue, 48th Floor
Seattle, WA 98101-3099
(206) 583-8888
Counsel for Cross-Petitioner
**Counsel of Record*

[3] Indeed, even the Firefighters recognize that cases involving agreements that contemplate compelling use of compensatory time should be treated differently. *See* Petition for Writ of Certiorari at 8 ("Where a comp time agreement does exist, however, but fails to resolve an unprovided-for situation such as the compelled use of comp time, the presumption should be that the employees – having had no obligation to agree to comp time at all – did not grant such a right to the employer.").